



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 BROADWAY

NEW YORK, NEW YORK 10007-1866

VIA EMAIL AND REGULAR MAIL

[See List of Addressees – Enclosure 1]

RE: Settlement Agreement and Order on Consent for Remedial Design, Remedial Investigation/Feasibility Study, and Cost Recovery  
New Cassel/Hicksville Groundwater Contamination Superfund Site

Dear Sir/Madam:

The Environmental Protection Agency (“EPA”) is in receipt of the September 23/24, 2014, comments on the draft Remedial Design (“RD”) Remedial Investigation/Feasibility Study (“RI/FS”) settlement agreement (“Agreement”) which was sent to your clients on July 23, 2014. We were hoping to meet with you before the end of October to discuss your comments in person, but because of scheduling conflicts our next meeting is not until November 12<sup>th</sup>. This letter summarizes EPA’s overall responses to the comments. It is not intended to be an exhaustive review of your comments, and therefore EPA reserves its right to respond further.

At the outset, it should be noted that EPA requested one response from all of the parties. In addition to various letters and emails, we received two sets of comments on the Agreement and two sets of comments on the Statements of Work (“SOWs”), and it appears that many of the parties chose not to submit comments on the SOWs (one for the RD and one for the RI/FS). EPA currently intends to negotiate and sign one agreement with two SOWs. We request again that you coordinate your responses in the future and submit only one set of comments. We understand that you are working with David Batson on establishing an allocation process which we hope will result in one functioning group with which EPA can work. We appreciate the effort you are expending in that regard, but, as we discussed at our August 18, 2014 meeting, it is imperative that you arrive at an interim agreement as soon as possible so that we can start the Operable Unit One (“OU1”) RD and the Operable Unit Three (“OU3”) RI/FS. There will be time as we move forward on this project for a full reckoning amongst the parties.

The comments submitted by Robert Lucic, on behalf of IMC Eastern Corp., and Lisa Rushton, on behalf of the so-called “upgradient parties” (GTE Operations and Support, Inc., Osram Sylvania, Inc., and Vishay GSI, Inc.), appear to reflect the desire of the parties to combine the OU3 RI/FS with the OU1 RD, or to forego the OU3 RI/FS entirely. This is unacceptable to EPA. As we explained to many of you when we first met last winter, EPA decided not to initiate OU1 RD/RA consent decree negotiations because we recognized that there was data gathering which needed to be performed as part of the pre-design for OU1. We opted for an agreement which would only involve the OU1 RD and the OU3 RI/FS which would require a commitment of less work and

funds for your clients. To achieve this objective, we proposed to forgo the more typical negotiation of an RD/RA consent decree and pursue an RD and RI/FS administrative order. Because the consent decree process takes more time (e.g., with a public comment period and the required motion and court approval), the projects would be on different time tables.

That being said, EPA recognizes the opportunity and is seeking to reduce the number of sampling events and combine sampling efforts where appropriate. However, while we think it is efficient and cost effective to perform the OU1 RD and the OU3 RI/FS under the same administrative settlement, the two efforts cannot be performed as the same project, and therefore there must be separate SOWs, each with its own set of deliverables proceeding on parallel tracks. As you are aware, the deliverables required for an RI/FS are different than the deliverables required for an RD. Of course, where there is overlap, EPA will consider incorporating by reference certain items from one project to the other. This remains to be discussed during the negotiations.

There were a number of items included in the comments<sup>1</sup> which are unacceptable to EPA and for which there is no reason for further discussion. EPA cannot sign an agreement which does not include, among other things, stipulated penalties, payment of future response costs, reimbursement of EPA costs incurred in the event of a work takeover, or financial assurance. Additionally, it is premature for EPA to consider a covenant not to sue for the Site as there is likely to be more work to be performed at these and other areas of the Site, including, *inter alia*, the implementation of the remedial action for OU1 and possible remedial design/remedial action for OU3. While EPA is willing to negotiate certain aspects related to these types of issues, such as the amount of the stipulated penalties, we cannot exclude these items entirely as proposed.

Certain parties have argued that the three plumes which comprise OU1 are divisible, and therefore they have no liability for work to be performed at the plumes for which they are not “responsible.” EPA’s selected remedy is an initial action intended to establish containment and effectuate removal of contaminant mass where concentrations of total VOC concentrations are greater than 100 micrograms per liter. The selected remedy for OU1 seeks to minimize further migration of contaminants and is not a final remedy for OU1. Concentrations less than 100 micrograms per liter (ug/L) are present within OU1 and are not addressed in the selected remedy (see Figure 2 from EPA’s OU1 ROD). As discussed in the OU1 ROD, additional data concerning Site-related contaminants may become available prior to the implementation of the selected remedy and may be considered during the design of the selected remedy. The pre-design work for OU1 will include data gathering efforts to help inform the remedial design, which includes among other things, installation of new monitoring wells and sampling of those new and existing monitoring wells. That data will be used to design the remedies intended to target the areas exceeding 100 ug/L and can additionally be used to inform decisions about areas within OU1 that are less than 100 ug/L (present between the three plumes designated by the sum of PCE, TCE, and 1,1,1-TCA greater than 100 ug/L).

We cannot determine that the plumes are not comingled based on the one sample, located at 185 to 205 feet below ground surface, which Kevin Maldonado identified in his September 24, 2014,

<sup>1</sup> The comments include those submitted by Charlotte Biblow on behalf of Island Transportation Corporation, 2632 Realty Development Corporation, Grand Machinery Exchange, Inc., Arkwin Industries, Inc., IMC Eastern Corporation, Barouh Eaton Allen Corp., Tishcon Corporation, Utility Manufacturing, and Nest Equities, Inc., and joined by Kevin Maldonado on behalf of Next Millenium Realty, LLC and 101 Frost Street Associates, LP.

comment letter to EPA. Additionally, as you know, the OU1 ROD calls for some significant portion of the work to be performed relating to the different areas of groundwater contamination but with the uniform purpose of treating all of the OU1 contaminated groundwater. This treatment method was selected to avoid the excess cost and additional disruption to the neighborhood if multiple treatment plants had to be designed, sited, and built. Thus, while reserving our rights and subject to the additional information which is to be obtained during the pre-design work, and while we expect a joint proposal to include all of the required RD work, we could consider acknowledging that not all the parties will ultimately be responsible for all portions work under the proposed Agreement.

Similarly, the upgradient parties have argued that the plume emanating from their properties are not comingled with the eastern plume of OU1. These parties have requested a meeting with EPA to discuss their technical justification for opting out of participating in the OU1 work. We are currently working on scheduling this meeting. However, until such time as EPA may be convinced that the upgradient parties' plume is not comingled with the OU1 eastern plume, EPA expects these parties to participate in the OU1 RD.

Finally, as to Mr. Maldonado's claim that the eastern plume ends before the OU3 boundary and that therefore his clients cannot possibly be responsible for OU3, it should be noted that EPA has never delineated the toe of the eastern plume, nor any other plume at the Site, for that matter. As discussed above, we have limited information about OU3, which is the very reason why an investigation needs to be performed.

If, based on this letter, your client is unwilling to continue to participate in these negotiations, please inform me immediately. You are also welcome to provide any additional comments on the Agreement and the SOWs in advance of the November 12<sup>th</sup> meeting. As previously discussed at our meeting in September, EPA expects to complete these negotiations by mid-December. EPA is hopeful that we will reach a settlement.

If you have any questions, please do not hesitate to call me at 212-637-3183.

Thank you for your cooperation in this matter.

Sincerely,

Sharon E. Kivowitz  
Assistant Regional Counsel